IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-292

THOMAS L. FILE, ELIZABETH J. FILE,
ROBERT H. FILE, FLORA V. FILE,
BORIS CHERNIKOFF, JR., and
HELEN E. CHERNIKOFF,
Petitioners

v.

STATE OF ALASKA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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August 22, 1979

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CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. _____

THOMAS L. FILE, ELIZABETH J. FILE, ROBERT H. FILE, FLORA V. FILE, BORIS CHERNIKOFF, JR., and HELEN E. CHERNIKOFF,

Petitioners

v.

STATE OF ALASKA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

The petitioners, THOMAS L. FILE, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Alaska Supreme Court entered in this proceeding on April 6, 1979.

OPINION BELOW

The Order Denying Rehearing and the Opinion of the Alaska Supreme Court appear in the Appendix hereto. The Opinion is reported at 593 P.2d 268 (Alaska, 1979).

The Memorandum of Decision of the Superior Court for the State of Alaska, First Judicial District at Juneau, appears in the Appendix hereto.

JURISDICTION

The judgment of the Alaska Supreme Court was entered on April 6, 1979. A timely petition for rehearing was denied on May 24, 1979, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the seaward boundary of a federal homestead patent issued in the State of Alaska along the coast of the Gastineau Channel under a 1924 survey is the meander line.

2. Whether the Alaska Supreme Court can construe a homestead patent to land conveyed by the Department of the Interior as not conveying the shoreline of the Gastineau Channel after inclusion of the shoreline has been affirmed by Shore Space Restoration Order No. 274 in 1935 prior to the issuance of the patent in 1937.

STATUTORY PROVISIONS INVOLVED

Revised Statutes of the United States, 1878, Title XXXII: § 2289. Who may enter certain unappropriated public lands.

Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of

intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter-section or a less quantity of unappropriated public lands, upon which such person may have filed a pre-emption claim, or which may, at the time the application is made, be subject to pre-emption at one dollar and twenty-five cents per acre; or eighty acres or less of such unappropriated lands, at two dollars and fifty cents per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same have been surveyed. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

41 STATUTE 1959

Statutes at Large, Vol. 41, p. 1059, Chap. 265.—An Act To provide for the abolition of the eighty-rod reserved shore spaces between claims on shore waters in Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the Act of May 14, 1898 (Thirtieth Statutes at Large, page 409), extending the homestead laws to Alaska, and of the Act of March 3, 1903 (Thirty-second Statutes at Large, page 1028), amendatory thereof, insofar as they reserve from sale and entry a space of at least eighty rods in width between tracts sold or entered under the provisions thereof along the shore of any navigable water, and provide that no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, shall not apply to lands classified and listed by the Secretary of Agriculture for entry under the Act of June 11, 1906 (Thirty-fourth Statutes, page 233), and that the Secretary of the Interior

may upon application to enter or otherwise in his discretion restore to entry and disposition such reserved spaces and may waive the restriction that no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water as to such lands as he shall determine are not necessary for harborage uses and purposes.

Approved, June 5, 1920.

STATEMENT OF THE CASE

This case was brought by respondent, STATE OF ALASKA, to eject petitioners, THOMAS L. FILE, et al., from land situated on the Gastineau Channel in the City and Borough of Juneau, Alaska. The State claims equitable ownership of the land by virtue of selection pursuant to the Alaska Statehood Act of July 7, 1958, 72 Stat. 339 (1958), as amended. The petitioners claim the land as accretions to and part of the homestead of their predecessor in interest, Daniel W. A. Pederson, the father of ELIZABETH J. (Pederson) FILE and HELEN E. (Pederson) CHERNIKOFF. The following facts are not in dispute:

In the 1920's, Daniel W. A. Pederson settled on an L-shaped parcel of land near the mouth of the Mendenhall River. In 1929, Daniel W. A. Pederson filed his homestead entry application dated May 21, 1929, under the most recent survey of the property, U.S. Survey 1536, conducted in 1924 and accepted by the General Land Office on May 19, 1926. (R, F. 1, p. 9, Ex. No. 1 to Affidavit of A. Lee Petersen; R, F. 3, Pls. Exs. No. 9 and 10.) In 1932, in response to Pederson's application, the General Land Office of the United States Department of the Interior commissioned a survey of his homestead. The survey and plat were accepted by the General Land Office on March 18, 1935, as United States Survey No. 2136. (R, F. 3, Pls.

Exs. No. 11 and 2.) On July 26, 1937, Mr. Pederson received his patent pursuant to the Revised Statutes of the United States, Title XXXII, Chap. 5, § 2289. (R, F. 3, Pls. Ex. No. 4.) Petitioners and their predecessors in title have always treated the homestead as bordering on the shoreline of the Gastineau Channel. Similarly, they believed they owned land which had accreted to the shoreline over the last fifty years. Tons of silt are deposited into the Gastineau Channel at the mouth of the Mendenhall River, approximately one quarter mile east of U.S. Survey No. 2136. This silt forms a substantial portion of accretions to the shoreline. The remaining accretions are due to land emergence as a result of deglaciation; that is, land uplift as a result of a release of ice load as glaciers melt. This phenomenon is termed "isostatic rebound." Approximately 117 acres have been added to the shoreline as a result of silt deposits and isostatic rebound. The parties have agreed that whoever owned the property to the shoreline of the Gastineau Channel would hold title to these accretions.

The disputed facts can be stated simply as follows:

Petitioners submit that the original patent to the Pederson homestead conveyed title to the shoreline, thus entitling them to accretions to that land. Respondent claims that the United States did not convey to the shoreline, but rather, reserved a thin sliver of land that separated the original Pederson homestead from the shore.

The land in dispute was surveyed four times. The tract is part of land which was withdrawn from the Tongass National Forest by Presidential Proclamation in 1922 and opened to homestead. (R, R. 3, Df. Ex. B.) The area withdrawn, termed the Mendenhall Valley Elimination, was surveyed in 1914 and again in 1919. (R, F. 3, Df. Exs. E and M.) In 1924, the General Land Office of the

Department of the Interior directed that an official survey be prepared: United States Survey No. 1536. (R, F. 3, p. 1, Df. Ex. 7; R, F. 3, Df. Ex. B.) The directive included instructions that, "the corners established by the Forest Service [in its 1919 survey] must be adopted for this survey whether or not the courses and distances of the connecting lines agree with those given." (R, F. 3, Pl. Ex. 7.) *File v. State*, 593 P.2d 268, 269 (Alaska, 1979). In 1932, the Pederson homestead was surveyed utilizing points established by U. S. Survey No. 1536. Plats of the 1924 survey are reproduced in *File v. State, supra.*, at pages 273 and 274.

The 1924 survey of the Mendenhall Valley Elimination began at Corner No. 1, described in the special instructions to the surveyor for U. S. Survey No. 1536 as follows:

> Corner is at base of steep timbered slope and at west end of grassland at approximate mean high tide line of north shore of Gastineau Channel. (R, F. 3, Pl. Ex. 7, p. 1)

The survey then proceeds around the boundary of the elimination in back of the shoreline. The survey then follows the shoreline to Corner No. 14, which is a meander corner (the court found the line from Corner No. 13 to Corner No. 14 to be a meander line, *File v. State, supra*, at 271). A line which connects Corner No. 14 and Corner No. 1 is identical to the contested boundary of the Pederson homestead.

Just as the 1924 Survey No. 1536 utilized the corners established in the 1919 survey, the 1932 Survey No. 2136 of the Pederson homestead used the corners established in the 1924 survey. (R, F. 3, Pls. Ex. 11.) When Daniel W. A. Pederson applied for his patent in 1929, Corner Nos. 14 and 1 of the 1924 survey became Corner Nos. 1 and 2, respectively, in Pederson's application. *Id.*, at 270. In the

1932 survey, Corner No. 1 in the application became Corner No. 5. *Id.*, at 270, n. 3. This confusing number manipulation yielded the following result: the line between Corner Nos. 5 and 6 in the 1932 survey is identical to the line between Corner Nos. 14 and 1 in the survey of the 1924 Mendenhall Valley Elimination. *Id.*, at 270.

The Alaska Supreme Court held that the Pederson patent incorporated by reference the 1932 survey, including the plat reproduced in the decision and the surveyor's field notes and description. *Id.*, at 270. The court found from the plat that line 5-6 angled away from the shoreline, and that therefore, on the face of the patent, the land conveyed did not include the shoreline. *Id.*, at 270-271.

As to the 1924 survey, the court determined that line 14-1 was not a meander line, rejecting petitioner's evidence to the contrary as "not persuasive." *Id.*, at 271. The court found that because the surveyor's entry for line 14-1 was not designated a meander line and because an insert into the 1924 plat which lists course and distance of all meanders did not include line 14-1, that it was a true line. *Id.*, at 271. The court did not rule on whether the 1924 survey was controlling as the survey in effect at the time of the homestead entry. *Id.*, at 271, fn. 7. Evidence from the 1914 and 1919 surveys was not considered. *Id.*, at 271.

Finally, the court found that a Shore Space Restoration Order, No. 274, dated February 5, 1935, issued to Pederson, although persuasive, did not outweigh the state's position. *Id.*, at 272. The order waives the statutory requirement that prevents any homestead from extending more than one hundred and sixty rods along a navigable body of water. The order was promulgated pursuant to 41 Stat. 1059 (1920). Petitioners asserted that the order would not have been necessary unless the Pederson homestead was considered by the General Land

Office to extend along the shores of the Gastineau Channel, a navigable body of water.

The Alaska Supreme Court agreed with the conclusion of both parties that the issues in this case are controlled by federal law. *Id.*, at 270. The decisions of the Superior Court and Supreme Court of the State of Alaska held that the State of Alaska was entitled to select the accreted property under the Alaska Statehood Act. These decisions are not in accord with federal court decisions interpreting similar land patents.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE UNIQUE TIDELANDS OF THE LAND PATENTED ALONG THE EXPANSIVE COASTLINE OF THE STATE OF ALASKA.

Alaska borders the Pacific Ocean, the Bering Sea and the Arctic Ocean for total shoreline of 6,640 miles. Its coastline exceeds that of all the 48 coterminus states by nearly 1,000 miles. And when Alaskan water borders are extended to include all islands, sounds, bays and inlets, the coastline of Alaska increases five fold to approximately 30,000 miles. *Encyclopedia Americana*, Vol. 1, p. 463 (1978). The parties and lower courts have recognized that throughout this coastline expanse, and particularly in regard to the shoreline of the subject patent in issue, tides vary dramatically from -4.5′ at low tide to +22′ at high tide; and, as opposed to her sister states of continental location, tide demarcations are not definite, but subtle and deceptive due to the absence of vegetation high tide demarcation caused by the presence of tidal grass which is inundated at high tide. Pursuant to section 6 of the Alaska Statehood Act, 72 Stat. 339 (1958), the State of

Alaska is entitled to withdraw 102,950,000 acres of land from what was the Territory of Alaska.

Under the Alaska Native Claims Settlement Act, 85 Stat. 688 (1971), certain lands were to be claimed by recognized native corporations, the State of Alaska and the federal government, which had previously owned approximately 99% of Alaska's 566,432 square mile area. Under section 17(d)(2), the United States Secretary of the Interior was authorized to withdraw up to 80 million acres as wilderness or protected status lands. There is currently pending in the Senate Energy Committee at least two bills dealing with this withdrawal: HR 39 sponsored by Representative Morris Udall and S 9 sponsored by Senator Henry Jackson.

The survey under which Petitioner's predecessor in interest entered the land for homestead was done in 1924, in what was then a remote area where land values were small and precise methods of survey impractical due to the amount of land to be surveyed, the land's general location, its topography, and the forces of nature (climate and tidal forces) which affected the land. At this point, it is noted that the Supreme Court of Alaska seemed to place great emphasis on the plats depicting the subject homestead; however, as was established by the State's witnesses during the course of trial, the plats were prepared by cartographers in Denver, Colorado, who have never seen or viewed the land, and this was their conception of how the land would appear. Considering the vast amounts of land which will be disposed of and classified under pending federal legislation, it is imperative that this Court review and, if necessary, clarify past precedents of federal patent construction to ensure equity and the preservation of property interests which repose in private individuals under long-standing patents that may similarly be the subject of litigation seeking divestment of land titles under pending legislation or litigation. The remoteness of

Alaska lands, and in many instances their derivation from old patents and attendant surveys, requires this review so that legal precedent may finally be established under which competing interests may be determined. Not since the great Midwest land-rush days have so many thousands, yes, even millions of acres, been in the arena for disposal.

The State of Alaska maintains that it may deny Petitioners title to accretions, premised upon an alleged reservation by the United States of a sliver of land which supposedly separated the Pederson homestead from the water. In turn, the State claims title to these accretions through the United States under a tentative land selection pursuant to the Alaska Statehood Act, 72 Stat. 339 (1958). Petitioners claim title through their predecessor, Daniel W. A. Pederson, under direct homestead patent from the United States, granted in 1937.

The Alaska Supreme Court determined that the sliver of land was reserved by reliance, in part, on the 1932 survey, which indicates that line 5-6 on the shoreline is a true line and angles away from the water's edge on the plat. *File v. State, supra.*, at 270. Petitioners contend that this interpretation of the 1932 survey is contrary to federal authority on patent construction. Petitioners further contend that the 1924 survey is controlling in this case, and that the court's interpretation of the 1924 survey is similarly at odds with federal authority.

2. THE DECISION OF THE ALASKA SUPREME COURT CONFLICTS WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT AND OTHER FEDERAL COURTS AS TO THE PROPER INTERPRETATION OF LAND PATENTS ISSUED BY THE FEDERAL GOVERNMENT.

This Court has been confronted with patent construction problems (such as those involved in the instant case)

on previous occasions. In *United States v. Lane*, 260 U.S. 662, 43 S. Ct. 236, 67 L. Ed. 448 (1923), determining the extent of the patent, this Court stated the general rule, applicable to those cases as follows:

> The facts bring the cases fairly within the rule announced by this court in *Mitchell v. Smale*, . . . and not within the exception which was followed in the *Jeems Bayou* case. So far as the instant cases are concerned, there is nothing in the circumstances to suggest the conclusion that any fraud was committed or probable mistake made by Warren. *At the time of his survey, the lands were of such little value, the locality so wild and remote, and the attendant difficulties so great, that the expenditure of energy and money necessary to run the lines with minute regard to the simuosities of the lake would have been quite out of proportion to the gain.* (Emphasis added) *Id.*, at 664-665.

The *Lane* case has been interpreted to enunciate three criteria for determining whether a patent conveys to the water and not to a survey line that deviates from the shore:

> (1) The size of the parcel involved;
>
> (2) The intent of the surveyor; . . . and
>
> (3) The nature and value of the land in relation to other conditions surrounding the making of the disputed survey. *United States v. 295.90 Acres of Land, etc., Cty. of Lee, Fla.*, 368 F.Supp. 1301 (D.C. Fla. 1974).

In concluding and awarding the platted landowner the unplatted land up to the boundary of the body of water, this Court stated at p. 666 and p. 667:

> Considering the circumstances in respect of the character and value of the land, the wildness and remoteness of the region, and the difficulties surrounding the

> work of the surveyors, the failure to run the lines with more particularity was not unreasonable, and we are constrained to agree with the lower court in holding that waters of the lake, *and not the traverse line*, constitute the boundaries.

Examination of the application of these criteria indicates that the omitted land must not be extensive (as compared with the surveyed land), the omission must not be fraudulent, and the omission must be a slight deviation resulting from the general impracticability of surveying wild and remote areas where land values do not justify more accuracy, such as involved in the instant case when the surveys were accomplished. (Compare *Jeems Bayou Fishing and Hunting Club v. United States*, 260 U.S. 561, 43 S. Ct. 205, 67 L. Ed. 402 (1923); inapplicable to the instant case on the facts involved.)

In *Internal Improvement Fund of State of Florida v. Nowak*, 401 F.2d 708 (5th Cir. 1968), the court construed a patent to include a parcel of land that was omitted from the survey (the decision includes a plat at p. 710 which is particularly illustrative). The court applied the *Lane* doctrine, holding:

> ... We believe *United States v. Lane* is controlling ... The exception [in the *Jeems Bayou* case] is inapplicable because Tract 3837-A is not particularly large in relation to the total acreage on the plat, there is no evidence of such gross error as to constitute a fraudulent survey, and there is positive evidence Harris [the surveyor] intended for the river to be the northern boundary. *Id.*, at 718.

In determining the surveyor's intent, the court considered the fact that tracts adjacent to the omitted land and part of the same survey all abutted the river. *Id.*, at 714. The omission was justified due to the relatively large amount of land surveyed and the limitation on accuracy presented

by the difficulty of surveying in the terrain juxtaposed with the total price allotted for the survey.

In *United States v. 295.90 Acres of Land, supra*, at 1306, the court followed the general rule that:

> Where lands are patented according to an unofficial survey showing meander lines along a body of water, any excess land is apportioned to the patentee and its title is extended to the water's edge in accordance with the intent of the surveyor in making the shoreline one of the calls of the description.

The court applied the *Lane* case because the omitted land was small in relation to the total (the court noting that in *Jeems Bayou*, the new land was almost double the tract shown). *Id.*, at 1308. In weighing the intent of the surveyor, the court found that reference in the surveyor's notes to traversing a mangrove swamp indicated a boundary at the water. *Id.*, at 1309. Emphasis was also accorded to the call in the survey which indicated the starting point as "on north side of channel." *Id.*, at 1309. Finally, the court determined that due to the wild and remote nature of the land, it could not be easily surveyed or even traversed on foot. *Id.*, at 1309.

The instant case clearly falls within the general rule articulated in *Lane*. First, the quantity of land omitted from the survey, including substantial accretions to the present time, would be 117 acres, as compared to the total patent acreage of 160 acres. At the time of the 1924, or even the 1932 survey, the land omitted would be much smaller, as is clear from the plats. See *File v. State, supra.*, at 273 and 274. The omission is clearly small enough relative to the patent conveyance to fall within the perview of the *Lane* doctrine.

Second, it is clear that the survey was intended to convey to the waterline. In the 1924 survey, Corner No. 14

is a meander corner on the high tide line. This is not in dispute. Corner No. 1 is described in the special instructions to the surveyor as located at approximate mean high tide of the north shore of the Gastineau Channel. (R, F. 3, Pl. Ex. 7) Just as the phrase, "on north side of channel," in *U. S. v. 295.90 Acres of Land, supra.*, was evidence of a boundary on the water, the above instruction shows the surveyor's intent to begin Corner No. 1 on the Gastineau Channel. Further, the seaward boundary lines from Corner Nos. 10-9 through 14-1, all located on the Gastineau Channel, are listed under the centered heading, "Meanders." (R, F. 3, Pl. Ex. 6) All of these lines, including line 14-1, the boundary in question, are described in the field notes as "Land, level, partly marshy, subject to inundation by the high tides of Gastineau Channel." (R, F. 3, Pl. Ex. 6) Just as in the case of *Internal Improvement Fund of State of Florida v. Nowak, supra.*, the surveyor remained on the shoreline for several adjacent tracts, including the land ultimately patented to Pederson.

Extrinsic evidence also indicates that the intent of the survey was to convey the shoreline of the Gastineau Channel. In 1919, President Woodrow Wilson issued a proclamation declaring that the land "between the foot of the Mendenhall Glacier and the high tide line of the Gastineau Channel and to be known as the Mendenhall Valley Elimination" was to be withdrawn from the Tongass National Forest and opened to homesteading. (R, F. 3, D. Ex. A.) It was the clear intent of the United States to convey to the shoreline. This is why instructions to the 1924 survey indicated the survey begin at a corner at approximate mean high tide (i.e., Corner No. 1 of Survey No. 1536). Survey No. 1536, the commissioned survey of the Mendenhall Valley Elimination, should be construed as conveying to the mean high tide line of the Gastineau Channel. Since petitioners maintain that the 1924 survey is the controlling survey, that portion which delineates the

Pederson homestead must be assumed to have bordered on the mean high tide line of the Gastineau Channel. Petitioners' position is further bolstered by Shore Space Restoration Order No. 274. The order, promulgated pursuant to 41 Stat. 1059 (1920) and dated February 5, 1935, waived the statutory requirements that no homestead could extend more than 160 rods along the shoreline of navigable waters, and that there had to be at least 80 rods in width between tracts of land sold along the shore of any navigable water. Pederson's land patent was granted in 1937. If the Pederson homestead was not on the shore of navigable water, then there was no reason for the findings and entry of Shore Space Restoration Order No. 274.

In regard to the final criteria used in applying the general rule, the land in question is exactly the type of wild and remote locality referred to in the *Lane* case. This area of Alaska is subject to extreme tidal fluctuations, as great as a 26-foot difference from high to low tides. The shoreline cannot be delineated by reference to vegetation, the lowlands being covered by grasses that tolerate inundation with seawater. The Mendenhall Valley Elimination, as well as the Pederson homestead, consisted of land of relatively little value, which would not justify the expenditure of energy and money necessary to run meander and survey lines with complete accuracy.

The Alaska Supreme Court avoided addressing the *Lane* doctrine by finding that line 14-1 on the 1924 survey was not a meander line. *File v. State, supra.*, at 271, n. 7. The court found the line to be a true line. *Id.*, at 271. Petitioners assert that this finding was an error. The *Lane* doctrine is applied to determine whether a boundary meanders a shoreline, and should have been examined in light of the facts in the existing case. Even assuming that line 14-1 is a true line, the above analysis would indicate that the intent of the patent was to convey to the mean high tide line. Petitioners contend, therefore, that the

Lane doctrine should apply. If the surveyor's intent was to convey to the edge of the water, it does not seem significant whether the line is more readily designated a true line than a meander line. Petitioners respectfully submit that the *Lane* doctrine should be construed to apply to either a true or meander line if the line is found to approximate the water's edge and the surveyor's intent was to convey to the water.

The court did not clearly address petitioners' argument that the 1924 survey controls the boundary question. *File v. State, supra.*, at 271, n. 7. Petitioners assert that Pederson's right to the land in question should be determined by the survey in effect when he entered his homestead. It is well settled that as between subsequent surveys, *the survey in effect at the time the homestead entrant entered upon the land* is the controlling plat or survey by which the patent ultimately issued is governed. *United States v. State Investment Company*, 264 U.S. 206, 44 S.Ct 289, 64 L.Ed 639 (1924); *Lane v. Darlington*, 249 U.S. 331, 39 S.Ct. 299, 63 L.Ed. 629 (1919); *Knapp v. Alexander-Edgar Lumber Company*, 237 U.S. 162, 35 S.Ct. 515, 69 L.Ed. 894 (1915); *United States v. Detroit T.&L. Company*, 200 U.S. 321, 26 S.Ct. 282, 50 L.Ed. 499 (1906); *Cragin v. Powell*, 128 U.S. 691, 9 S. Ct. 203, 32 L.Ed. 566 (1888); *First National Bank of Decatur, Nebraska v. United States*, 59 F.2d 367 (8th Cir. 1932); *Trustees of Internal Improvement Fund v. Toffel*, 145 So.2d 737 (Fla. App. 1962); *Kelsey v. Lake Childs Company*, 112 So.887 (Fla. 1927); *Wing v. Wallace*, 246 P.8 (Ida. 1928); *Warner Valley Stock Company v. Calderwood*, 59 P.115 (Ore. 1889). As was stated in *Wing v. Wallace, supra*, at p. 9:

> The patent, when issued, relates back to the date of entry, and the date of entry thus controls. ***
>
> The record is silent as to the date of entry; therefore the court did not err in refusing to quiet title in appellants, since in this state a party must recover on the strength of his own title (citations omitted), and, not having shown under which survey their entry came, the court was without a basis upon which to act.

The basis for this principle is that where the completion of an act requires the individual completion of several consecutive acts, the issuance of a patent upon compliance with such consecutive procedures relates back to the date of the initial act, i.e., the date of initial entry. *United States v. Detroit T. & L. Company, supra.* Without such a doctrine, a homestead entrant would not be apprised of the extent to which he could exercise dominion and control over the property entered; and further, he would be unable to defend the land against encroachments. The application of the Relation Back Doctrine to the case at hand mandated that the court rule that U.S. Survey No. 1536, conducted in 1924, and accepted by the General Land Office on May 19, 1926, be the controlling survey, especially since Pederson filed his application for entry for the land before U. S. Survey No. 2136, and after the acceptance of U.S. Survey No. 1536 by the General Land Office.

Petitioners have contended thus far that the Alaska Supreme Court erred in not applying the general rule in *Lane* to the instant case. Petitioners have relied to this point on the 1924 survey, asserting that *Lane* mandates a finding that line 14-1 is a meander line, and in the alternative that even if line 14-1 is a true line, it is located at mean high tide line and the patent conveys to the water. Application of the *Lane* doctrine to the instant case would rectify the inequity of the Alaska Supreme Court decision. As that court held:

> We reach the holding in this case with some reluctance, for the appellants' situation is compelling. Pederson and the appellants obviously believed that they owned down to the shoreline.

> They have used the property as shorefront property and have exercised the incidence of ownership over the accreted land for the last 50 years. Unfortunately, the evidence seems clear that both the 1932 and the 1924 surveys did not convey to a meander line, and the surveys must control. *File v. State, supra,* at 272.

Beyond the instant case, application of the *Lane* doctrine would bring construction of federal patents in the Alaska court into compliance with federal court decisions. That this is necessary is illustrated by the fact that the Alaska Supreme Court in the instant case did not address the *Lane* doctrine. Without this Court's decision, many individuals in Alaska who trace title to tidelands to a federal patent are vulnerable to loss of land through state selection, because of the general inaccuracy of early surveys.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Alaska Supreme Court.

Respectfully submitted,

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August 22, 1979

APPENDIX A

IN THE

Supreme Court of the State of Alaska

THOMAS L. FILE,
ELIZABETH J. FILE,
ROBERT H. FILE,
FLORA V. FILE,
BORIS CHERNIKOFF, JR.,
and ELLEN E. CHERNIKOFF,
Appellants,

v.

STATE OF ALASKA,
Appellee.

File No. 3482

ORDER

File No. 3537

On consideration of the Petition for Rehearing filed April 16, 1979,

It is ORDERED:

The Petition for Rehearing is denied.

Entered by direction of the Court at Juneau, Alaska.

DATED: May 24, 1979

CLERK OF THE SUPREME COURT

(signed)

Robert D. Bacon

APPENDIX B

IN THE

Supreme Court of the State of Alaska

THOMAS L. FILE,
ELIZABETH J. FILE,
ROBERT H. FILE,
FLORA V. FILE,
BORIS CHERNIKOFF, JR.,
and ELLEN E. CHERNIKOFF,
Appellants,

v.

STATE OF ALASKA,
Appellee.

File Nos. 3482/3537

OPINION

No. 1827 -
April 6, 1979

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau, Allen T. Compton, Judge

Appearances: James F. Petersen, Juneau, A. Lee Petersen, Anchorage, for Appellants. G. Thomas Koester, Assistant Attorney General, Avrum M. Gross, Attorney General, Juneau, for Appellee.

Before: Rabinowitz, Chief Justice, Connor, Boochever, Burke and Matthews, Justices

MATTHEWS, Justice.

This is a land dispute. The land in question consists of approximately 117 acres added by accretion to the shoreline of the Gastineau Channel over the last fifty years. The appellants claim that Daniel Pederson, their predecessor in interest, homesteaded the shoreline to which the land accreted, and that the land belongs to them. The state claims that the federal government retained its interest in the shoreline and that the state now owns the

accreted land by virtue of selection made under the Alaska Statehood Act.[1] The lower court held in favor of the state.

The land in dispute formed part of the Mendenhall Valley Elimination—a large tract of land which was withdrawn from the Tongass National Forest by Presidential Proclamation in 1922 and opened to homesteading. The boundaries of the Mendenhall Valley Elimination had been defined by an unofficial survey conducted by a Forest Service surveyor in 1919. That survey established various boundary markers and corners, including corners along the Gastineau Channel which the superior court found to be meander corners. A meander corner establishes a point on a meander line. Meander lines are straight lines that approximate the sinuosities of the line of mean high tide. While the meander line remains fixed, the line of mean high tide may change over the years due to accretions or deletions. Patented land which extends to the line of mean high tide may be increased in size or diminished according to such accretions or deletions[2]. At the time of the 1919 survey and thereafter, the land was subject to accretion caused by silt carried down from the Mendenhall Glacier and deposited at the mouth of the Mendenhall River. The land has also been gradually rising up as the glacier recedes, a process known as isostatic rebound.

In 1924 the General Land Office directed that an official survey of the Mendenhall Valley Elimination be prepared. This survey, U.S. Survey No. 1536, was made by Fred Dahlquist, a U.S. Cadastral Engineer. Dahlquist was instructed by the General Land Office that "the corners established by the Forest Service [in its 1919 survey] must be adopted for this survey whether or not the courses and distances of the connecting lines agree with those given." Pursuant to these instructions, Dahlquist began his survey

[1] 72 Stat. 339 (July 7, 1958) (as amended).

[2] *See Hawkins v. Alaska Freight Lines, Inc.*, 410 P.2d 992, 994 (Alaska 1966).

at corner number one of the 1919 survey and followed the prior survey all the way around the elimination. In his field notes Dahlquist consistently stated that he was proceeding on a true line until he reached corner ten, which meets the Gastineau Channel some distance easterly of the Pederson homestead. There he wrote that he was proceeding along a meander line. He continued to note that he was proceeding on the meander line until he reached corner fourteen. That corner is identical with Corner No. 5 of the Pederson homestead. His notes indicate that he proceeded "Thence . . . on true line leaving meander line . . . . Over level, open grassy land . . . to Cor. No. 1, the place of beginning."

Dahlquist's survey was approved and accepted by the General Land Office in 1926 and became the official survey of the Mendenhall Valley Elimination. A portion of the plat of this survey is attached as an appendix to this opinion.

In 1929 the appellants' predecessor in interest, Daniel Pederson, filed a homestead application covering land in the southwest corner of the area surveyed by Dahlquist. The homesteading application described a tract of land "situate within the boundaries of U.S. Survey No. 1536 . . . containing approximately 160 acres." The southern boundary of the property ran "beginning at Cor. No. 1, identical with Cor. No. 14, U.S. Survey 1536; thence . . . to Cor. No. 2 identical with Cor. No. 1 said survey 1536 . . . ."[3]

In 1932, as required by law, Pederson's homestead was surveyed. This survey, U.S. Survey No. 2136, followed along line 14-1 of No. 1536. The surveyor's notes described the line as going "over level grassy meadows subject to overflow during extreme high tides." This survey was approved in 1935. The plat of this survey is also appended to this opinion.

[3] Corner number 1 in the application became corner number 5 in the later 1932 survey.

In 1937 the federal government issued Pederson a patent to the land he had homesteaded. The patent conveyed the land

> embraced in H.E. Survey No. 2136, situate within the Mendenhall Elimination from the Tongass National Forest ... containing one hundred fifty-nine acres and sixty-three hundredths of an acre, according to the Official Plat of the Survey of the said Land, on file in the General Land Office.

Pederson and his successors in interest continued to use the property as though it were shorefront property and have considered the approximately 117 acres that have accreted to the shore as their own. In 1966 the State of Alaska gave notice that it was selecting the accreted lands pursuant to the Alaska Statehood Act. The Bureau of Land Management tentatively approved the selection. This lawsuit followed.

Both parties agree that the issues in this case are controlled by federal law.[4] When the federal government grants land via a patent, the patent is the highest evidence of title.[5] Here, the patent incorporates by reference the plat of survey No. 2136, made in 1932. The plat, including the surveyor's field notes and descriptions, thus becomes a part of the patent and controls the extent of the lands conveyed.[6]

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[4] *See Hughes v. Washington*, 389 U.S. 290, 292, 88 S. Ct. 438, 19 L.Ed.2d 530 (1970); *State v. Pankratz*, 538 P.2d 984, 988 (Alaska 1975).

[5] *United States v. Stone*, 69 U.S. (2 Wall.) 525, 535, 17 L.Ed. 765 (1864); *Walton v. United States*, 415 F.2d 121, 123 (10th Cir. 1969).

[6] *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 194-95, 10 S. Ct. 518, 33 L.Ed. 872 (1890); *Cragin v. Powell*, 128 U.S. 691, 696, 9 S. Ct. 203, 32 L.Ed. 566 (1888); *United States v. Reimann*, 504 F.2d 135, 140 (10th Cir. 1974); *Walton v. United States*, 415 F.2d 121, 123 (10th Cir. 1969); *Spar Consol. Mining and Devel. Co. v. Miller*, 568 P.2d 1159, 1161-62 (Colo. 1977).

On its face, the 1932 survey seems clear, and indicates that line 5-6 (identical to line 14-1 of the 1924 survey) is a true line. By the time of the survey considerable accretion had already occurred in the area, and corner 6, (identical to corner 1 of the 1924 survey) was some distance in from the shoreline. The official plat of the 1932 survey does not show that the boundary of Pederson's property was the Gastineau Channel. Rather, line 5-6 angles sharply away from the water's edge. Corners 5 and 6 are not designated "meander corners." Moreover, the patent conveys to Pederson property amounting to 159.63 acres. This is the area of the property within the boundaries of the 1932 survey and does not include land visible on the plat extending beyond line 5-6.

On the face of the patent therefore, there does not seem to be any question that the land conveyed to Pederson did not include the shoreline.

The appellants seek to avoid this conclusion by referring to the surveys conducted in 1919 and 1924. Prior surveys and other extrinsic evidence are admissible if they are relevant to show the proper boundaries of a disputed tract of land.[7] However, in this case, reference to the prior surveys does not help appellants. According to the description contained in Pederson's homestead entry, Pederson intended to stake a homestead that ran along line 14-1 of the 1924 survey. But line 14-1 does not appear to have been a meander line. The court below carefully

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[7] *See Graham v. Gill*, 223 U.S. 643, 645, 32 S. Ct. 396, 56 L.Ed. 586 (1912); *French Glenn Live Stock Co. v. Springer*, 185 U.S. 47, 54, 22 S. Ct. 563, 46 L.Ed. 800 (1902). The appellants also suggest that, rather than being merely evidence of the proper interpretation of the 1932 survey the 1924 survey controls the boundary question entirely. This is based on the premise that Pederson's right to the land was fixed by the survey in effect when he entered the homestead in 1929. We need not decide the issue, since it is our view that the 1924 survey did not create a meander line in any event. Even if the appellants' theory was correct, they would lose anyway.

reviewed the field notes, the plat and other evidence of the 1924 survey and concluded that although the surveyor intended to create a meander line from corner 10 through 14, the line from corner 14 to corner 1 was clearly not a meander line, it was a true line.

The evidence presented by the appellants is not persuasive to the contrary. It consists primarily of an analysis of statements taken out of context from the 1924 survey field notes. The appellants argue, for example that because the field notes describe the course travelled between corners 14 and 1 as "over level, open grassy lands ... subject to inundation by the high tides of Gastineau Channel" the surveyor stayed on the meander line. They reason that since he was on a meander line when he reached corner 14 and remained "level" as he traveled to corner 1, he never left the meander line. However the surveyor clearly stated that from corner 14 he was continuing to corner number 1 "on true line leaving meander line." This is explained by the appellants "as indicating that the meander line of the channel was not identical at that point with the mean high tide line and that while he was continuing along the main high tide line, he was no longer following the shoreline." This ignores the fact that at each corner of the survey, the surveyor meticulously entered whether he was following a true line or a meander line. Line 13-14 was a meander line, clearly marked as such in the field notes. In contrast, the entry for line 14-1 can have only one meaning—that the surveyor was back on a true line. This inference is further bolstered by the insert to the plat of the 1924 survey which lists the course and distance of all meander lines in the survey. The line between corners 14 and 1 is not listed as being a meander line.

The appellants reliance on even earlier surveys is also misplaced. Corner 14 of the 1924 survey corresponds—as per the surveyor's instructions—with corner number 14 of the 1919 survey. This corner in turn corresponded to

corner number 4 of an earlier survey conducted in 1914. Corner 4 in the 1914 survey was designated a meander corner. From this the appellants conclude that corner number 14 of the 1924 survey was a meander corner. Similarly, corner 1 of the 1924 survey began at the mean high tide line at the same place that corner 1 of the 1919 survey began. However, regardless what the corners represented in either the 1914 or the 1919 survey, they were not designated meander corners in the 1924 survey.[8] Since the 1924 survey was the first official survey of the area, we deem it to be controlling of the question. Until rights are given to private parties the government can change the boundaries of surveyed lands as it pleases.[9] It appears that the government did so in this case.

The appellants have advanced one more item of evidence that should be discussed. This is Shore Space Restoration Order No. 274, a document which was issued in 1935. The statute to which the order refers prohibits any homestead from extending more than 160 rods along a navigable body of water. The order waives that requirement for "that tract of land situated on the Gastineau Channel and described as U.S. Survey No. 2136 ...." From the existence of the order, and the language therein, the appellants argue that the Pederson homestead must have been located on the shoreline, or the order itself would have been unnecessary.

Although this evidence is persuasive, we conclude as did the trial court, that without more, it is not sufficient to outweigh the evidence in favor of the state's position in the case.

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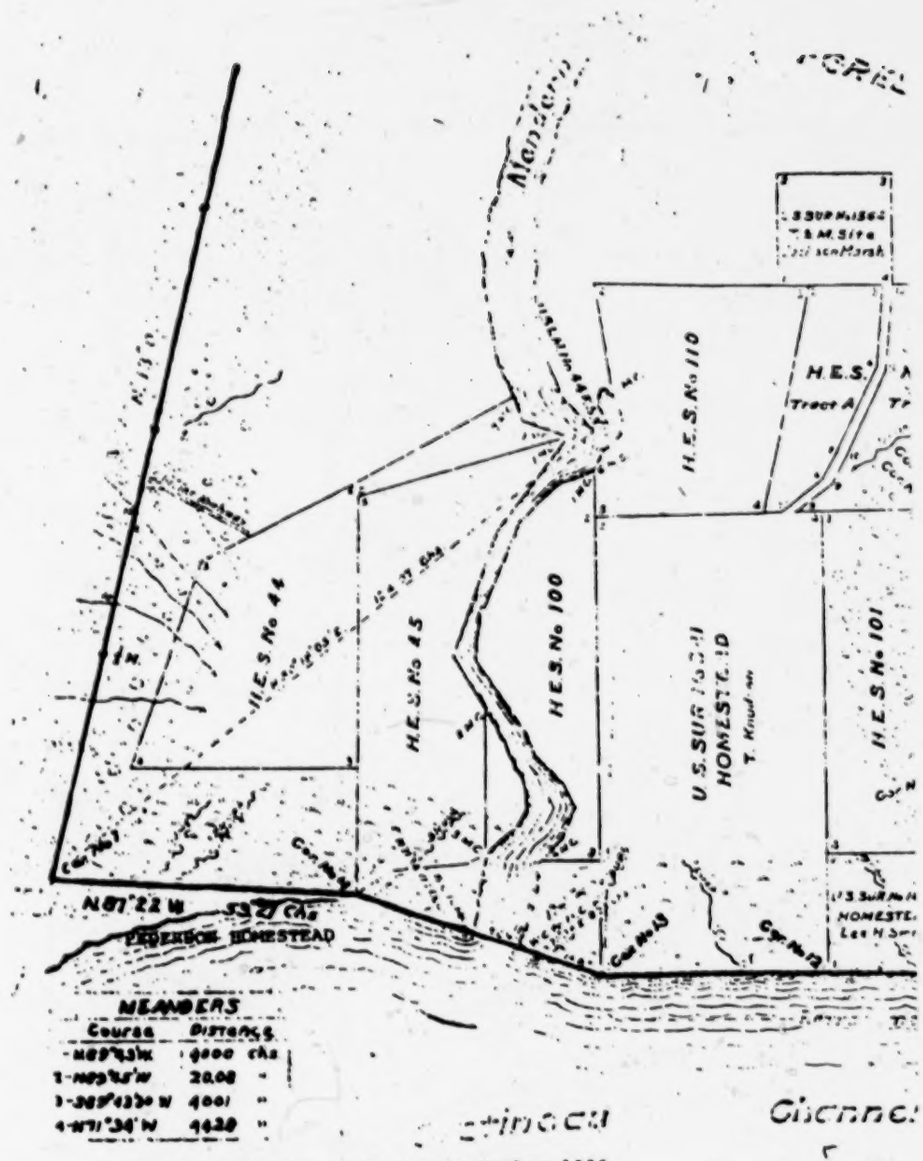
[8] It is agreed by the parties that the line between corners thirteen and fourteen is a meander line, and that corner fourteen is thus a meander corner with respect to that line.

[9] *Cox v. Hart*, 260 U.S. 427, 436, 43 S. Ct. 154, 67 L.Ed. 332 (1922); *United States v. Reimann*, 504 F.2d 135, 138 (10th Cir. 1974); *Warner Valley Stock Co. v. Caiderwood*, 36 Or. 228, 59 P. 115, 116 (Ore. 1899).

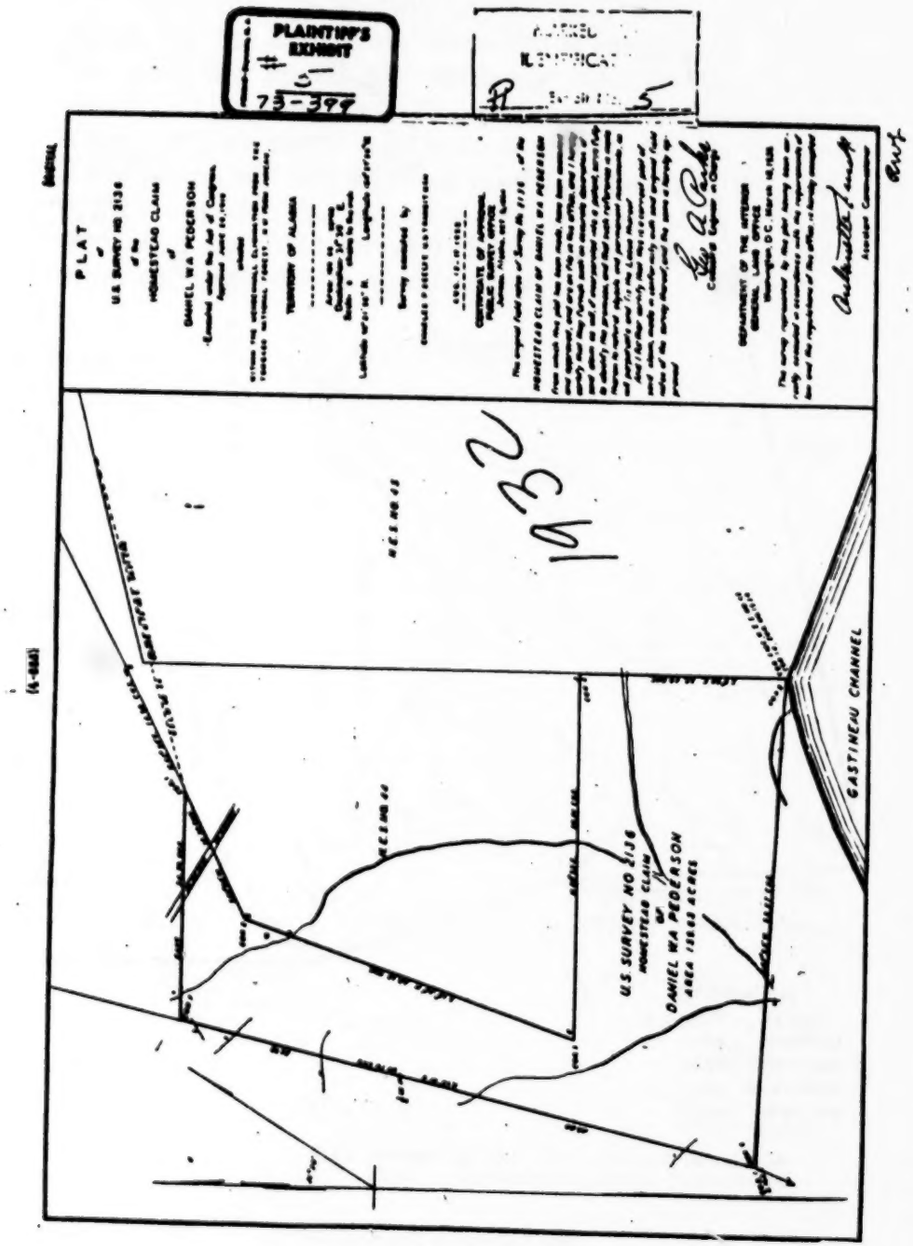
We reach the holding in this case with some reluctance, for the appellants' situation is compelling. Pederson and the appellants obviously believed they owned down to the shoreline. They have used the property as shorefront property and have exercised the incidents of ownership over the accreted land for the last fifty years. Unfortunately, the evidence seems clear that both the 1932 and the 1924 surveys did not convey to a meander line, and the surveys must control.

AFFIRMED.



Southwest Corner, U.S. Survey Number 1536
Mendenhall Valley Elimination. 1924

See following illustration.


PLAINTIFF'S EXHIBIT
#
73-399
PLAT
U.S. SURVEY NO. 3138
HOMESTEAD CLAIM
DANIEL WA PEDERSON
TERRITORY OF ALASKA
1432
GASTINEAU CHANNEL
U.S. SURVEY NO 3138
HOMESTEAD CLAIM
DANIEL WA PEDERSON

APPENDIX C

IN THE

Superior Court for the State of Alaska

FIRST JUDICIAL DISTRICT AT JUNEAU

STATE OF ALASKA,
Plaintiff,

v.

THOMAS L. FILE, et al.,
Defendants.

C.A. No. 73-399

MEMORANDUM OF DECISION

The case before the Court is one that is unusually interesting and challenging. It is interesting in that its background depicts the development of the lower Mendenhall Valley, both in terms of those who settled there and the natural forces that have played and continue to play a part in land formation. It is challenging in terms of the legal theories advanced and their application to facts and statutes that are somewhat unique.

This case involves a dispute over title to lands encompassed by unapproved U. S. Survey No. 4573. The disputed land lies between the present northern shore of Gastineau Channel and the southern boundary of U. S. Survey No. 2136, the character of which is the central issue of the case. In 1974, the area consisted of approximately 117 acres.

Plaintiff readily concedes that if the disputed land is an accretion to No. 2136, title thereto vests in Defendants. It is Plaintiff's contention that there were uplands south of No. 2136 prior to Defendants' entry thereon, title to which remained in the federal government. In Plaintiff's

view, it is that land and accretions thereto that is in dispute, not any accretions to No. 2136.

In 1914, U. S. Survey No. 1042 (Homestead Entry Survey No. 45, or H.E.S. 45) established meander corner (M.C.) 4 on the shore of Gastineau Channel. This survey is situated east of what later became No. 2136, the two having a common line and a common corner, M.C. 4. This corner became corner 14 of U. S. Survey No. 1536, and corner 5 of No. 2136. However, these latter corners were not designated as meander corners. It should here be noted that No. 1536 was the larger area from which No. 2136 was carved. Line 14-1 on No. 1536 is the same as 5-6 on No. 2136, and is the south boundary of the survey in question, i.e., No. 2136.

In 1919, steps were begun to withdraw the Mendenhall Valley from the Tongass National Forest. This was known as the Mendenhall Valley Elimination from the Tongass National Forest. The elimination was to cover an area "between the foot of Mendenhall Glacier and the high tide line of Gastineau Channel." Def.Ex.A.

A boundary survey was made in the summer of 1919 by Geo. W. Root, Surveyor—Forest Service. From his field notes, corner 1 was established "at base of steep timbered slope and at west edge of grassland at approximate mean high tide line of north shore of Gastineau Channel". The survey closed from corner 14 to corner 1, "over open, level grassland." Corner 14 is the same as M.C. 4 of No. 1042.

This survey formed the basis for a Proclamation by President Warren G. Harding excluding this land, and others, from the Tongass National Forest, and withdrawing it from other public lands so that it could eventually be opened to entry. This Proclamation, Def. Ex. B, was dated February 7, 1922.

Excerpts from the field notes and the plat symbols of the 1919 survey lead to the conclusion that the southern

boundary of the survey, i.e., the 14-1 line, meandered the shore of Gastineau Channel at mean high tide. Thus when the area was transferred from Forest Service jurisdiction to General Land Office jurisdiction via the Proclamation, the southern boundary of the elimination was a meander line.

The first approved, or official, survey was made by Fred Dahlquist, U. S. Cadastral Engineer, in the summer of 1924. This was No. 1536. In the instructions to Mr. Dahlquist the following comments are found:

> The Commissioner of the General Land Office has directed that the boundaries of the Mendenhall Valley Elimination from the Tongass National Forest *be surveyed* and you are hereby authorized and instructed to proceed with the survey . . .
>
> The foregoing description was obtained from the field notes of the Forest Service Survey of the tract which formed the basis of the description which entered into the Executive Order of February 7, 1922, creating the elimination and the *corners* established by the Forest Service *must be adopted* for this survey *whether or not the courses and distances of the connecting lines agree with those given.* Pl. Ex. 7 (Emphasis added).

The Dahlquist survey thus was required to use the same corners as the Root survey, and thus the survey closed on the 14-1 line. Again, Corner 14 of No. 1536 was the same as M.C. 4 of No. 1042. In describing the 14-1 process, Mr. Dahlquist states:

> Thence . . . *on true line leaving meander line.* Over level, open grassy land. . . .
>
> Land level, partly marshy, subject to *inundation by high tides* of Gastineau Channel.

Further, under general description:

> . . . That portion lying South of the Glacier Highway Road is nearly all open, grassy land, parts of which are subject to inundation by *high tides* of Gastineau Channel. Pl. Ex. 6 (Emphasis added).

Although the Dahlquist Field Notes described various meander lines, the 14-1 is not so described. The plat itself, Pl. Ex. 2, shows Gastineau Channel angling away from the 14-1 line at corner 14. Further the plat insert disclosing the course and distance of meanders does not indicate that the 14-1 line was a meander line.

The survey and plat were accepted by the General Land Office on May 19, 1926.

In 1929, Mr. Daniel W. A. Pederson, Defendants' predecessor, entered upon a portion of No. 1536 and established a homestead. As was required by law, his homestead had to be surveyed. This was accomplished by Chas. P. Seelye, U.S. Transitman, in the summer of 1932. This was No. 2136, the survey and plat being accepted on March 18, 1935. It consisted of 159.63 acres. Line 5-6 of No. 2136 is the same as the 14-1 line of No. 1536. Mr. Seelye's field notes, Pl. Ex. 5, describe the 14-1 line, or 5-6 line, as going "over level grassy meadows subject to overflow *during extreme high tides.*" (Emphasis added) The plat of No. 2136 shows the Gastineau Channel angling away from the 5-6 line at corner 5 (corner 14 of No. 1536, and M.C. 4 of 1042) somewhat more sharply than in the plat of 1536 showed.

On July 26, 1937, Mr. Pederson received his patent. The patent, Pl. Ex. 4, described the land granted as that

> . . . embraced in H.E. Survey No. 2136, situate within the Mendenhall Elimination from the Tongass National Forest . . . containing one hundred fifty-nine acres and sixty-three hundredths of an acre, *according to the Official Plat of*

> *the Survey* of the said Land *on file in the General Land Office.* (Emphasis added)

While these surveys and plats were being completed, and Mr. Pederson came upon the land, the forces of nature were continually acting upon the area. The Mendenhall River runs through No. 1536, emptying out into the Gastineau Channel approximately ¼ mile east of No. 2136. Tons of silt are emptied into the Channel daily, this material thereafter comprising part of substance that accretes to the shore.

The second natural force is the land emergence as a result of rebound from present localized deglaciation or, in other words, land uplift attributable to the release of ice load by melting of the numerous glaciers in the area. See Def. Ex. K and L. Neither party has suggested that land added in this manner should not be treated as "accreted," although strict definition would exclude it. For the purpose of this case, the Court has treated uplifted land as "accreted."

These two natural forces have added 117 acres between the 14-1 (5-6) line and the northern meander of Gastineau Channel between 1919 and 1974, assuming that the Root Survey 14-1 line was a meander line, i.e., a line established at mean high tide. Mean high tide is 15′ 4″. There is probably no way to determine what may have been accretion in the strict sense, and addition by rebound. However, if the increase was fairly even over the period, two acres per year were being added. This process was continuing *throughout* the period.

Defendants have submitted a plat regarding the rebound measurement, Def. Ex. J. Extrapolating from a measured boundary line, the plat depicts boundary lines as they may have been in 1924 using either the "Juneau—Rate of Emergence" or the "Auke Bay—Rate of Emergence." See Def. Ex. L, Table 1. The base line was measured, or surveyed in March, 1976.

The 5-6 line of No. 2136 is 3515'±. Using the Auke Bay rate, about 1500'± would be at or below mean high tide. Using the Juneau rate, about 350'± would be at or below.

Several problems become immediately apparent with respect to Def. Ex. J. First of all, it assumes a constant rate of emergence until 1976. However, Def. Ex. K suggests that "there is strong evidence from Yakutat, Juneau and Sitka records that the secular change has been leveling off since 1955..." This could account for a significant alteration in the "below mean high water" lines using Auke Bay and Juneau emergence rates and extrapolating either 52 years or 31 years. Secondly, the 1924 date is misleading since Mr. Pederson did not enter onto the land until 1929, and No. 2136 was not done until 1932. Taking these variables into consideration, it is just as probable that extrapolated lines were above. Further, the emergence figures do not take accretion into consideration. Thus little weight can be given to Def. Ex. J.

Robert V. Killewich and M. A. Menzies testified on Defendants' behalf. Both are registered engineers and land surveyors, and each is highly respected in the community. In their opinion, the 5-6 line of No. 2136 was a meander line. In each instance, however, the Root Survey of 1919, including Mr. Root's Field Notes, was used in arriving at their conclusions.

In 1973 Mr. Thomas L. File, one of the Defendants herein, corresponded with the Department of Law regarding this dispute. That correspondence appears as Pl. Ex. 10 and 11. Two items in Pl. Ex. 10 are of significance. The first is his sketch of the "approximate location of the meander line ... in 1932 as determined by available information." It is obvious that the meander line there depicted bears little relationship to the 5-6 line of No. 2136. The second is his reference to a slough that

traverses the survey in a north-south direction. This slough is described in the field notes as being 120 links wide, i.e., 79.2 feet (1 line = 7.92 inches) and, according to Mr. File, it is "wide enough to accommodate a battleship." It was apparently this slough and its branches that Mr. Pederson and others used to bring their boats far into No. 2136 and other surveys at high tides.

The resolution of this case turns upon which of several surveys the Court finds to define the extent of the grant to Mr. Pederson, Defendants' predecessor in title. Defendants have sidestepped the adverse implications of the 1932 and 1924 surveys by saying, in effect, that those surveys are junior in time and therefore must be subordinated to the calls and descriptions of senior surveys and extrinsic proof. Defendants implicitly invoke the general rule: "where the lines of senior and junior surveys conflict the lines of the senior survey control...." 11 C.J.S. Boundaries, § 61.

Pursuant to this rule, Defendants have attempted to show that the line marking the southern boundary of U. S. No. 2136 was, on previous senior surveys, a meander line which, by law and the intent of the original parties to the grant, was to extend to the mean high tide line. The mode of their proof is illustrated in affidavits in the file and by similar testimony at trial.

The issue presented in this case was summarized by the U. S. Court of Appeals in *U. S. v. Reimann*, 504 F.2d 135 (10th Cir. 1974) at 138:

> We are faced preliminarily with two seemingly inconsistent general rules: (1) "where the lines of senior and junior surveys conflict the lines of the senior survey control...." 11 C.J.S. Boundaries § 61, p. 633; (2) "the survey last accepted by the government before parting with title is the controlling survey." 73 C.J.S. Public Lands § 35, p. 684.

The facts of *Reimann* were as follows: In 1891 a survey by one Ferron was completed and accepted. Later, in 1902, a survey by one Hanson purported to find fault with the Ferron survey, and moved a line dividing two parcels to the north. This survey was also accepted. In 1907 the U. S. government conveyed parcels immediately south of the newly accepted dividing line to Reimann's predecessor in title "according to the Official Plat of the Survey of the said Land...." In 1926 a third survey by one Miller re-established the 1891 line, thus prejudicing the rights of Reimann's predecessors with respect to the northernmost strip of their parcel. The U. S. government claimed title to the strip under the Ferron survey.

The *Reimann* court found all of the cases cited by the government to support their claim under the Ferron survey to be distinguishable for one reason or another: one involved a junior survey conducted *after* a patent based on a senior survey had been issued; another relied on cases *not* involving conflict between two approved surveys conducted *prior* to passing of title.

Reimann prescribed the following rule of law where there is conflict between two officially approved surveys conducted prior to the passing of title:

> Prior to title passing from the United States, it is undisputed that the government has the power to survey and resurvey, establish and reestablish boundaries on its own lands. *Lane v. Darlington*, 249 U.S. 331, 39 S. Ct. 299, 63 L.Ed. 629 (1919); 43 U.S.C.A. § 772. But once patent has issued the rights of patentees are fixed and the government has no power to interfere with these rights, as by a corrective resurvey. *Cragin v. Powell*, [128 U.S. 691, 32 L.Ed. 566 (1888)]; *U.S. v. State Investment Co.*, 264 U.S. 206, 68 L.Ed. 639 (1924); *Ashley v. Hill*, 375 P.2d 337 (Colo. 1962); 43 U.S.C.A. § 772. The government has no

> power to control "previously disposed of lands." [citations omitted]. These authorities support the rule that the government is bound by the last official survey accepted prior to its divestment of title. Since no patents had been issued between the time of the Ferron and Hanson surveys, the government was empowered in 1902 to reestablish the boundaries on its own land.... It exercised this power when it *accepted the Hanson survey* [court's emphasis] with its new location of the corner monument....

Accord, *Kelsey v. Lake Childs Co.*, 112 So. 887, 888 (Fla. 1927); *Warner Valley Stock Co. v. Calderwood*, 59 P. 115 (Or. 1899); *Phelps v. Pacific Gas*, 190 P.2d 209, 212-213 (Cal. App. 1948); *Larson v. Larson*, 202 P.2d 121 (Cal. App. 1949); *Trustees of Internal Improvement Fund v. Toffel*, 145 So.2d 737, 741 (Fla. App. 1962).

It may be said that the principle which underlies such a rule, apart from the equities favoring parties who relied on the last approved survey, is that the sovereign, in surveying land, is not ascertaining boundaries, but is *creating* them. *Cox v. Hart*, 260 U.S. 427, 67 L.Ed. 332, 337. Thus, as the *creator* of boundaries, the sovereign may obliterate and recreate them, or it may characterize old boundaries in some new manner, according to its whim, in the absence of prejudice to the rights of others.

Finally, in the face of any assertion by Defendants that the 1932 or 1924 surveys cannot be effective to establish a *fixed* boundary because such a boundary would conflict with the intent evidenced in earlier surveys, *Reimann* offers the following answer:

> The fact that Hanson was mistaken in his location of the boundary here in dispute is likewise immaterial.... Being the controlling survey, its location of the boundary between the northern

> and southern "halves" of the township takes precedence, even if erroneous (or *"largely factitious"* and *"fatally defective"* as found by the trial court), insofar as the rights of the patentee whose patent was issued thereunder are concerned. [citations omitted].

The distinction between *Reimann* and the case at bar is clear: in *Reimann* the government was attempting to avoid the effect of its own surveys, whereas in this case it is a private party seeking to harken back to a more favorable plat. Nevertheless, it is the Court's view that the same rule must bind patentees as binds the government. To this end, the language of the Supreme Court of California in *Warner Valley Stock Co. v. Calderwood, supra*, is appropros:

> [A]s the second survey was made prior to the date of entry, and the entryman must be deemed to have taken with knowledge that the government has reserved the upland lying between the first survey and the margin of the lake, and he is therefore estopped to claim beyond the boundary of the survey under which he purchased. In such a case it cannot be claimed that he purchased with a view of acquiring riparian rights, as the government plats did not represent the lots as extending to the water's edge, and the purchase must be deemed to have been made with reference to the public surveys and plats as they existed at that time. Where the general government continues in ownership of lands which by the public surveys appear to abut upon nonnavigable waters, it must be conceded that it has the right and authority to resurvey and readjust the marginal survey, and reserve to itself any uplands that may subsequently appear between the

> survey and the actual margin of the water supposed to have been meandered in the first instance. *Cragin v. Powell*, [*supra*]

It being the rule of law that U.S.S. 2136 is the controlling survey, it remains to determine what effect that survey must be given. *Cragin v. Powell, supra*, at pp. 567-568, provides a convenient starting point for analysis:

> It is a well-settled principle that when lands are granted according to the official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and land marks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself.

Initially, several characteristics of the plat of U.S.S. 2136 should be noted. First, the corners that form the end points of the disputed line are not denominated meander corners (M.C.). Corner 5 *does* coincide with meander corner 4 from the 1914 survey of adjacent lands, No. 1042, but the earlier corner formed the end point of a line that indisputably meandered the shoreline of the *adjacent* land. Similarly, corner 5 coincides with corner 14 of No. 1536 which, from corners 10-14 was meandering the shore, but which by the plat and the notes of the surveyor ceased to meander at corner 14. Corner 6, when it was corner 1 of the Root Survey, appears to have been on the shore, but it was not denominated a meander corner. Thus Defendants' claim on this point is severely tested.

Second, the line between corners 5 and 6 does not appear to be a shoreline meander line: it is a straight line which departs considerably from the shore and terminates at an inland point.

Finally, the plat purports to delineate a limited area of 159.63 acres, while leaving a substantial parcel of land visible on the plat excluded from that area.

From the notes referred to earlier, it can be seen that the surveyor did not appear to contemplate a meander line. Indeed, from the 1924 survey, it appears that Mr. Dahlquist clearly intended a true line: after meandering the shore for four corners the survey closed over line 14-1 "on true line leaving meander line. . . . " The 1932 survey closed in the following fashion: "along line 14-1 to survey No. 1536", again "over level grassy meadows subject to overflow during extreme high tides," entering "heavy timber and dense undergrowth. . . . "

Even if the corners and line in question were denominated "meander", the dispute is not conclusively settled:

> [T]he mere fact that a line is run and designated as meandered is not conclusive against the government; where, for *any* reason, such as fraud or mistake, the surveyor omits to include in his survey large tracts of land lying between the meander line as surveyed or pretended to have been run on the ground and the streams and bodies of water meandered, the patents for the adjoining lots, although referring to the official plat of the survey, are merely grants of the premises limited by such meander line, and not by the water, and the intermediate land continues to be the property of the U. S. [footnote omitted]. 73 C.J.S. Public Lands § 32.

Accord, *Wilson and Co. v. U.S.*, 245 U.S. 24, 62 L. Ed. 128 (1917); and see *Trustees of Internal Improvement Fund v. Toffel, supra*, at 741, wherein the court notes:

> The general rule that a meander line is not a boundary, however, is subject to certain exceptions. Such a line may constitute a boundary where *so intended* or where it is established at such an excessive distance from the actual shore as to leave between it and the body of water an excess of unsurveyed land so great as to clearly and palpably indicate fraud or mistake in the survey. Where through fraud or mistake a segment of the public lands was erroneously omitted from the survey, the United States is not divested of title to it. (Emphasis added)

There is yet another reason that weighs heavily against Defendants. The process of accretion was a continuous process, even though a gradual one. Assuming that the Root Survey did establish the 14-1 line on the meander, it was a full 10 years thereafter that Mr. Pederson entered upon the land, and 3 years after that when No. 2136 was completed. Thus there had already been 10 to 13 years of accretion south of the survey, and thus south of Mr. Root's 14-1 line. If the rate of accretion was reasonably constant, and there is no evidence to suggest it was not, approximately 20 acres of land would have accreted by the time Mr. Pederson entered onto that portion of No. 1536 that was later officially platted as No. 2136. That 20 acres, or whatever amount had accreted since 1919, could not become an accretion to the Pederson homestead *before* the fact, since the result would have been a homestead substantially in excess of the 160 acre limitation.

The Court finds that in 1937 (the year the patent issued), in 1932 (the year of the plat and survey of No. 2136), and in 1929 (the year Mr. Pederson entered), the 14-1 line of No. 1536, which became the 5-6 line of No. 2136, was not a meander line or the mean high-water line of the north shore of the Gastineau Channel. That line was to the south thereof and on each of those dates.

The plat and survey of No. 2136 and the patent "appear on their face to be clear and suggest only a single

meaning." Def. Memo. in Opposition, p. 4. As a matter of law, the Court cannot go beyond those instruments, and the field notes made in connection therewith. Going as far back as Mr. Pederson's entry in 1929 is a concession to Defendants.

However, even if the Court were persuaded to go as far back as the Dahlquist Survey in 1924, which likewise appears clear on its face, the Defendants have not proved the 14-1 line thereon to be a meander line or the mean high-tide line by a preponderance of the evidence. Their experts' opinions are based in part upon reference to the Root Survey of 1919, including his field notes. As a matter of law, those are not material. While Mr. Root's survey established corners and provided a description to be used in the Presidential Proclamation, it was Mr. Dahlquist's survey that *created* boundaries. It was thus No. 1536 that was the first official survey of the area.

Had the line from 14-1 on No. 1536, or the 5-6 line on No. 2136 simply stated "thence along the meander of Gastineau Channel to the point of beginning," or words to that effect, it would have been clear that the southern boundary was the meander, wherever that meander could be found. Mr. Pederson could have homesteaded 160 acres with the south boundary thereof being the meander and the north an appropriate distance away to arrive at a 160 acre tract. As it was, the south boundary was not a meander or high-tide line by the time Mr. Pederson entered. Rather, it was a fixed line. Uplands had developed south of that line, and Mr. Pederson's 159.63 acres were all north thereof.

One last matter needs to be discussed, and that is Shore Space Restoration Order No. 274, a document discovered when Defendants were reviewing government files. See *Affidavit of A. Lee Petersen*, filed May 14, 1975. It appeared from the files that Mr. Pederson's original 1929 application had been withdrawn, but neither the re-filed

application nor most of the supporting information could be found. The Defendants argue that the "reason he was not allowed to proceed with his application in 1929 is explained" in the Shore Space Restoration Order. Unfortunately, Mr. Pederson's request for that order was not found, though Defendants certainly made diligent efforts to find it, as well as other missing documents. It is difficult to read that Order as "intending" that the south boundary of No. 2136 be on the Gastineau Channel. The shore space reservation found in 30 Stat. 409 refers to the shores of "navigable waters," and the definition of "navigable waters" is certainly broad enough to include the aforementioned slough of 120 links width, which was used to reach various properties in the area. If that slough were deemed a "navigable water," Mr. Pederson's application would fail unless he got departmental relief. It certainly does not follow that the reason for Mr. Pederson's withdrawal of his 1929 application was the result of any shore space problem. According to Defendants, he reapplied in 1932, but the Order was not entered until 1935! Furthermore, the Order recites "that no other withdrawal or reservation of said land shall be vacated, modified or in any wise affected hereby." As has heretofore been pointed out, by 1929 there was ten years of "accretion," and by 1932 there had been three more. The Order could not grant Mr. Pederson acreage in excess of that allowed by law, *i.e.*, 160 acres. No. 2136 consumed that amount within its own boundaries, without going beyond the southern boundary thereof.

Neither counsel nor the Court have been able to find any judicial interpretation of 30 Stat. 409, as amended. Without some evidence regarding the "why" of the request, the conclusions of Defendants are highly speculative. The Order, without more, is too ambiguous to have the substantive effect alleged. Defendants' argument is not persuasive.

This Memorandum of Decision shall constitute sufficient compliance with Rule 52(a), *A.R.Civ.P.*, to obviate the need for express findings of fact and conclusions of law. Counsel for Plaintiff shall prepare and serve a proposed judgment in accordance with Rule 78(a).

DATED at Juneau, Alaska, this 14th day of February, 1977.

.....

Allen T. Compton
Superior Court Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-292

THOMAS L. FILE, ELIZABETH J. FILE, ROBERT H. FILE, FLORA V. FILE, BORIS CHERNIKOFF, JR., and HELEN E. CHERNIKOFF,

Petitioners,

v.

STATE OF ALASKA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Alaska

RESPONDENT'S BRIEF IN OPPOSITION

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September 19, 1979

IN THE

Supreme Court of the United States

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THOMAS L. FILE, ELIZABETH J. FILE, ROBERT H. FILE, FLORA V. FILE, BORIS CHERNIKOFF, JR., and HELEN L. CHERNIKOFF,

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent State of Alaska respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Alaska Supreme Court's decision in this case. That decision is reported at 593 P.2d 268 (Alaska 1979).

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Questions Presented involve only questions of evidence and factual findings.

The two Questions Presented in the petition (p. 2) are:

> "1. Whether the seaward boundary of a federal homestead patent issued in the State of Alaska along the coast of the Gastineau Channel under a 1924 survey is the meander line.
>
> "2. Whether the Alaska Supreme Court can construe a homestead patent to land conveyed by the Department of the Interior as not conveying the shoreline of the Gastineau Channel after inclusion of the shoreline has been affirmed by Shore Space Restoration Order No. 274 in 1935 prior to the issuance of the patent in 1937."

The first question is clearly a question of fact: was the seaward boundary of the federal homestead patent a meander line or a true line? The Alaska Supreme Court answered this question as follows:

> On its face, the 1932 survey seems clear, and indicates that line 5-6 (identical to line 14-1 of the 1924 survey) [the seaward boundary at issue] is a true line. By the time of the survey considerable accretion had already occurred in the area, and corner 6, (identical to corner 1 of the 1924 survey) was some distance in from the shoreline. The official plat of the 1932 survey does not show that the boundary of Pederson's property was the

> Gastineau Channel. Rather, line 5-6 angled sharply away from the water's edge. Corners 5 and 6 are not designated "meander corners." Moreover, the patent conveys to Pederson property amounting to 159.63 acres. This is the area of the property within the boundaries of the 1932 survey and does not include land visible on the plat extending beyond line 5-6.
>
> On the face of the patent therefore, there does not seem to be any question that the land conveyed to Pederson did not include the shoreline.

593 P.2d at 270-271 (see petition, p. 5b).

A cursory glance at the plats appended to the Alaska Supreme Court's opinion, 593 P.2d at 273 and 274 (see petition, pp. 9b and 10b), demonstrates that there is ample evidence in the record to support the Alaska Supreme Court's conclusion; a thorough reading of the opinion removes any conceivable doubt.

The rule in this situation was stated in *Portland Railway, Light, & Power Company v. Railroad Commission of Oregon*, 229 U.S. 397, 411-412 (1913) as follows:

> Ordinarily, in cases which come before us for review, this court accepts the facts as found by the state supreme court. An examination of the record in this case convinces us that the conclusions reached by the court do not bring the case within that exceptional class where this court will reexamine the facts found, with a view to ascertaining the correctness of the conclusions reached. In

> this case, the facts found by the lower court and adopted in the supreme court are supported by competent testimony; and this court does not sit to retry issues of fact thus heard and determined by the properly constituted tribunals of the state having jurisdiction of the subject.

(Citations omitted.) Also see *Fry Roofing Company v. Wood*, 344 U.S. 157, 160 (1952).

The second question is an evidentiary one, going to the weight which the Court should place on a Shore Space Restoration Order. Again, the Alaska Supreme Court's conclusion should not be disturbed:

> Although this evidence is persuasive, we conclude as did the trial court, that without more, it is not sufficient to outweigh the evidence in favor of the state's position in the case.

593 P.2d at 272 (see petition, p. 7b). This Court should not retry the issue. *Portland R. Company v. Railroad Commission, supra; Fry Roofing Company v. Wood, supra.*

2. The issues were fully considered and correctly decided by the Alaska Supreme Court.

While the Questions Presented only involve factual determinations, Petitioners' argument intimates that the Alaska Supreme Court did not correctly decide the case. See petition, pp. 10-18. The Alaska Supreme Court stated its analytic approach as follows:

> Both parties agree that the issues in this case are controlled by federal law. When the

> federal government grants land via a patent, the patent is the highest evidence of title. Here, the patent incorporates by reference the plat of Survey No. 2136, made in 1932. The plat, including the surveyor's field notes and descriptions, thus becomes a part of the patent and controls the extent of the lands conveyed.

593 P.2d at 270 (see petition, p. 4b) (footnotes omitted).

Reference to the United States Supreme Court cases cited by the Alaska Supreme Court in support of this analytic approach demonstrates beyond question that the Alaska Supreme Court was aware of the procedure which must be followed in construing federal patents. The only remaining questions, as set out above, were factual ones which should not be reached by this Court.

3. Decisions which Petitioners contend are in conflict with the Alaska Supreme Court's decision in this case are distinquishable on their facts.

In *United States v. Lane*, 260 U.S. 662 (1923), and *Internal Improvement Fund of State of Florida v. Nowak*, 401 F.2d 708 (5th Cir. 1968), there was positive evidence that the surveyor intended the boundary to be shoreline. In the instant case, however, there was positive evidence that the surveyor left the shoreline and that the disputed boundary was intended by the surveyor to be a true line and not a meander line:

> ... [T]he surveyor clearly stated that from corner 14 he was continuing to corner 1 "on true line leaving meander line." ... [A]t

> each corner of the survey, the surveyor meticulously entered whether he was following a true line or a meander line. Line 13-14 was a meander line, clearly marked as such in the field notes. In contrast, the entry for line 14-1 can have only one meaning—that the surveyor was back on a true line. This inference is further bolstered by the insert to the plat of the 1924 survey which lists the course and distance of all meander lines in the survey. The line between corners 14 and 1 is not listed as being a meander line.

593 P.2d at 268 (see petition, p. 6b).

In *United States v. 295.90 acres of land*, 368 F.Supp. 1301 (D.C. Fla. 1974), the land was patented according to an unofficial survey and the surveyor had made the shoreline one of the calls of the description. In the instant case, the lands were patented according to an official survey where the disputed boundary was described in the field notes as a "true line."

The cases cited by Petitioners as conflicting with the Alaska Supreme Court's decision in this case are distinquishable on their facts. Since there is no conflict, the Alaska Supreme Court's decision should not be disturbed.

4. The issues are not important enough to warrant review by this Court.

The issues in this case are limited by the very detailed facts presented: a homestead patent incorporating by reference a plat showing the shoreline angling away from the homestead boundary, and a

Shore Space Restoration Order which (it is contended) casts doubt on the patent. It is probable that this limited, specific factual context will never arise again; if it does, the issues presented will be as narrow as the ones presented here and will be decided in the same way they were decided here. Review by this Court simply is unwarranted.

Summarizing, this was a simple factual case which was decided by the trial court and the Alaska Supreme Court in accord with prior decisions by this Court. It does not present any "special and important reasons" for granting a writ of certiorari as required by Rule 19 of the Rules of the Supreme Court, and otherwise presents no special or unique circumstances which justify granting the petition.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

DATED this 19th day of September, 1979, at Juneau, Alaska.

Respectfully submitted,

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